

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

11 MARK ALFORD,

12 Petitioner,

13 v.

14 UNITED STATES OF AMERICA,

15 Respondent.

Case No. 1:22-cv-01056-ADA-CDB

FINDINGS AND RECOMMENDATIONS THAT
THIS ACTION BE DISMISSED WITHOUT
PREJUDICE FOR FAILURE TO PROSECUTE
AND FAILURE TO COMPLY WITH A COURT
ORDER

OBJECTIONS, IF ANY, ARE DUE WITHIN
TWENTY-ONE DAYS.

16
17 (ECF No. 7)

18 **Background and Procedural History**

19 Plaintiff Mark Alford (“Plaintiff”) initiated this action on August 19, 2022. (ECF No. 1). That
20 same date, the Clerk of Court issued a summons and ordered Plaintiff to diligently pursue and provide
21 proof of service of the summons and complaint. (ECF Nos. 2, 4). The Court noted failure to timely
22 serve the summons and complaint may result in the imposition of sanctions, including the dismissal of
23 unserved defendants. (ECF No. 4 at 1) (citing F.R. Civ. P. Rule 4)).

24 On October 31, 2022, the Court issued an order to show cause no later than November 21,
25 2022, why sanctions should not be imposed for Plaintiff’s failure to prosecute this action and to
26 comply with the Court’s orders to file proofs of service of the summons and complaint. (ECF No. 7).
27 Plaintiff has not filed any response or otherwise indicated an intention to prosecute this case.

1 Accordingly, for the reasons described below, the Court recommends that Plaintiff's case be
2 dismissed without prejudice for failure to comply with a court order and failure to prosecute.

3 **Failure to Prosecute and Comply with a Court Order**

4 Courts weigh five factors in deciding whether to dismiss a case for failure to comply with a
5 court order: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to
6 manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition
7 of cases on their merits; and (5) the availability of less drastic sanctions." *Allen v. Bayer Corp. (In re:*
8 *Phenylpropanolamine (PPA) Prods. Liab. Litig.*), 460 F.3d 1217, 1226 (9th Cir. 2006) (citation
9 omitted). These factors are "not a series of conditions precedent before the judge can do anything,"
10 but for a judge to think about what to do. *Valley Eng'r's Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1057
11 (9th Cir. 1998).

12 The public's interest in expeditious resolution of litigation weighs in favor of dismissal of this
13 action. The public has an overriding interest in securing "the just, speedy, and inexpensive
14 determination of every action." Fed. R. Civ. P. 1; *see Yourish v. California Amplifier*, 191 F.3d 983,
15 990 (9th Cir. 1999) ("The public's interest in expeditious resolution of litigation always favors
16 dismissal."). Plaintiff was provided twenty-one days to respond to the Court's request. (ECF No. 7).
17 No response was filed. Accordingly, this factor weighs in favor of dismissal.

18 As to the Court's need to manage its docket, "[t]he trial judge is in the best position to
19 determine whether the delay in a particular case interferes with docket management and the public
20 interest.... It is incumbent upon the Court to manage its docket without being subject to routine
21 noncompliance of litigants...." *Pagtalunan v. Galaza*, 291 F.3d 639, 639 (9th Cir. 2002) (citing *Ferdik*
22 *v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)). Here, Plaintiff has failed to respond to the Court's
23 October 31, 2022, Order. (ECF No. 7). The Court is experiencing an ongoing judicial emergency and
24 heavy caseload. Plaintiff's failure to respond is delaying the case and interfering with docket
25 management. Therefore, the second factor weighs in favor of dismissal.

26 Turning to the risk of prejudice, a defendant suffers prejudice if a plaintiff's actions impair a
27 defendant's ability to go to trial or threaten to interfere with the rightful decision of the case. *Adriana*
28 *Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990). Plaintiff's failure to comply with a court

1 order and to prosecute this case imposes sufficient prejudice upon Defendant. Therefore, the third
2 factor weighs in favor of dismissal.

3 Next, because public policy favors disposition of cases on the merits, this factor weighs against
4 dismissal of Plaintiff's case. *See Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998)
5 (the public policy favoring disposition of cases on their merits counsels strongly against dismissal).

6 Lastly, the availability of less drastic sanctions weighs in favor of dismissal. "The district
7 court abuses its discretion if it imposes a sanction of dismissal without first considering the impact of
8 the sanction and the adequacy of less drastic sanctions." *Malone*, 833 F.2d at 131-32 (quoting *United*
9 *States v. Nat'l Med. Enters., Inc.*, 792 F.2d 906, 912 (9th Cir. 1986)). At this stage in the proceedings,
10 there is little available to the Court which would constitute a satisfactory lesser sanction while
11 protecting the Court from further unnecessary expenditures of its scarce resources. Given the stage of
12 these proceedings, the preclusion of evidence or witness is not available. Additionally, the Court only
13 recommends dismissal without prejudice. Because the dismissal being considered in this case is
14 without prejudice, the Court is stopping short of using the harshest possible sanction of dismissal with
15 prejudice.

16 After weighing the factors, the Court finds that dismissal without prejudice is appropriate.

17 **Conclusion and Recommendations**

18 Based on the foregoing, the Court HEREBY RECOMMENDS that:

19 1. This action be dismissed without prejudice for failure to prosecute and failure to comply
20 with a court order; and
21 2. The Clerk of Court be directed to close this case.

22 These findings and recommendations will be submitted to the United States district judge
23 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
24 after being served with these findings and recommendations, Petitioner may file written objections
25 with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and
26 Recommendations." Plaintiffs are advised that failure to file objections within the specified time may
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result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: November 23, 2022

Chris D. Brown
UNITED STATES MAGISTRATE JUDGE